A

SAMSU ABAS v. MOHAMED MEENUDEEN SAHEED

HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
[ORIGINATING SUMMONS NO: 24NCVC-998-12-2014]
21 MAY 2015

B

CIVIL PROCEDURE: *Appeal – Notice of appeal – Leave of court to enlarge or abridge time to file notice of appeal – Whether High Court had discretion to extend time to file notice of appeal – Whether there would be prejudice and injustice if extension of time was granted – Whether there was sufficient reasons to allow extension of time – Rules of the High Court 1980, O. 3 r. 5(1)*

C

The respondent brought a tort action against the applicant for allegedly trespassing and damaging the respondent's properties which were kept in a premise located in Langkawi. The tort action stemmed from a tenancy agreement entered into between the respondent as tenant, and the applicant as landlord of the said premises. The respondent, a Sri Lankan citizen, was a reputable jewellery designer and artist who had rented the applicant's premise to showcase and display his merchandise for sale. The respondent alleged that the applicant had entered into the said premise without the respondent's knowledge and consent and had thrown all the respondent's valuable goods out from the premise. On 24 February 2014, the Sessions Court Judge ('SCJ') decided in favour of the respondent. The respondent was awarded RM300,000 as damages and costs of RM5,000 on 17 November 2014 by the Registrar. The applicant was not satisfied with the SCJ's decision dated 24 February 2014, but did not file a notice of appeal within 14 days as stipulated under O. 55 r. 2 of the Rules of Court 2012 ('ROC'). Only on 24 December 2014, some nine months later, did the appellant file an Originating Summons ('OS') and sought leave of the court to enlarge or abridge the time to file the notice of appeal. The reason given for the delay was that the applicant had mistakenly thought that the decision of the SCJ dated 24 December 2014 was not final until a sum for damages had been determined by the court. Further, the applicant's reasons for the appeal were that (i) the respondent was not legally permitted to stay in Malaysia during the time when the trial was proceeding; and (ii) the tenancy agreement entered into between the parties contravened the provisions of the Enactment No. 63 (Malay Reservations), Kedah, and as such, the tenancy agreement was void under the Contracts Act 1950 and the alleged wrongful entry into the premise could not be considered as trespass in law. The issue that arose for the court's determination, amongst others, was whether leave of court should be granted to the applicant to enlarge or abridge the time to file the notice of appeal.

D

E

F

G

H

I

Held (dismissing applicant's application with cost):

(1) The court has the discretion whether to allow or not to allow an application for an extension of time to file a notice of appeal pursuant to O. 3 r. 5 of the ROC. However, the court was baffled by the reason given by the applicant. The applicant who was represented by a firm of solicitors ought to have been advised by his solicitors that the SCJ's decision dated 24 February 2014 was final. If the solicitors failed to advise the applicant properly, this could not be a tenable reason for the court to exercise its discretion. Likewise, if the solicitors overlooked the stipulated timeline or was unaware of the timeline to file a notice of appeal, this also could not be a tenable reason for this court to exercise its discretion. A solicitor's mistake was not an acceptable explanation for an extension of time application. (paras 7, 15 & 17)

(2) The manner in which the reason for delay was proffered was as if the applicant was unaware of the procedural law. 'Ignorance of procedural law is not an acceptable explanation'. Regardless whether the fault lies with the solicitor or the applicant, the reason offered by the applicant for his failure to file a notice of appeal within time was not an acceptable reason for the court to exercise its discretion to enlarge the time. Nine months was too long for the applicant to realise his mistake. Further, the court was of the view that the applicant's reason for the delay was questionable as the applicant did not take any action to file a notice of appeal within 14 days from 17 November 2014, the date the decision on the sum of damages was made. On this premise, this court did not allow the application to enlarge time to file the notice of appeal. (paras 17 & 18)

(3) If the applicant's application was allowed, there would be likelihood of prejudice and injustice to the respondent. The allegation that the respondent was not legally permitted to stay in Malaysia at the time of trial could not derogate or vitiate the legality of the proceedings in the lower court. Even if the allegation was true, the respondent was not de-barred from giving evidence as a competent witness in the proceedings. The applicant's allegation that the tenancy agreement had contravened the State law did not provide any legal basis for the applicant to damage the respondent's properties. Even if the court accepted that the tenancy agreement was void, the court could not accept that the applicant had the right to damage the respondent's properties, just because the tenancy agreement was void. (paras 22-24 & 26)

(4) Void or invalid tenancy agreement did not give rise to a right for a landlord to damage the tenant's belongings which were kept in the landlord's premise. A tenancy agreement is within the purview of the law of contract, whereas, damage to property is within the purview of law of tort. In this instant case, the applicant damaged the respondent's

properties without just cause, as such the respondent had a right to sue the applicant under the law of tort. It would be unjust for the court to deny the respondent's right to claim compensation for damage to his properties which was caused by the applicant. (para 27)

Case(s) referred to:
Ahmad Yahaya & Anor v. Ahmad Sulaiman [1972] 1 LNS 4 HC ***(refd)***
Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 1 LNS 42 FC ***(refd)***
Gurdev Kaur Bhag Singh v. BSN Commercial Bank (M) Bhd [2003] 1 CLJ 429 CA ***(refd)***
Hau Khee Wee & Anor v. Chua Kian Tong & Anor [1986] 1 LNS 26 HC ***(refd)***
Ling Siok Seng v. Ting Sieh Chung [1998] 4 CLJ 169 CA ***(refd)***
MBf Finance Bhd v. Alluwi Salleh t/a ABS Bina Enterprise & Anor [2002] 2 CLJ 133 HC ***(refd)***
National Union of Bank Employees v. Director General of Trade Unions & Anor [2014] 1 LNS 1124 CA ***(refd)***
Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor and Another Appeal [1995] 4 CLJ 484 CA ***(refd)***
Ratnam v. Cumarasamy & Anor [1964] 1 LNS 237 PC ***(refd)***
Saeed U Khan v. Lee Kok Hooi [2000] 7 CLJ 454 HC ***(refd)***
Safety Insurance Co Ltd v. Wong Choo Yong [1970] 1 LNS 141 FC ***(refd)***
Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1993] 4 CLJ 176 HC ***(refd)***
Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 CA ***(refd)***
Tan Siew Peng v. OCBC Bank (M) Bhd [1998] 2 CLJ 684 CA ***(refd)***
Tractors (M) Bhd v. Southern Estates Sdn Bhd & Anor [1984] 1 CLJ 154; [1984] 1 CLJ (Rep) 398 FC ***(refd)***
Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 CLJ 628 CA ***(refd)***
Zul Ali v. PLUS Malaysia [2015] 1 LNS 126 HC ***(refd)***

Legislation referred to:
Enactment No. 63 (Malay Reservations), s. 9
Rules of Court 2012, O. 3 r. 5, O. 55 rr. 2, 3

For the appellant - Zakaria Md Saad; M/s Zakaria & Co
For the respondent - R Thevan; M/s S Raman & Co

Reported by Sandra Gabriel

JUDGMENT

Choo Kah Sing JC:

Introduction

[1] This was an originating summons filed by the applicant/defendant seeking leave to enlarge time to file his notice of appeal against the decision of the learned Sessions Court Judge ('SCJ') dated 24 February 2014 pursuant to O. 55 of the Rules of Court 2012 (ROC). On 12 May 2015, this court disallowed the appellant's application. The reasons for the decision of this court are as below.

Brief Background Facts

[2] The respondent brought a tort action against the appellant at the lower court. The respondent alleged that the appellant had trespassed and damaged the respondent's properties which were kept in a premises known as GM672, Lot 7, Mukim Padang Mat Sirat, Langkawi. The said premises belonged to the appellant. The tort action stemmed from a tenancy agreement entered into between the parties. The respondent was the tenant and the appellant was the landlord of the said premises.

[3] The respondent, a Sri Lankan citizen, is a reputable jewellery designer and artist. The respondent rented the appellant's premises to showcase his collection, paintings as well as display his merchandise for sale. On or around April 2012, the parties had a verbal agreement. The parties agreed to alter the terms of the tenancy agreement with regard to the size of the rented premises and the monthly rental of the premises.

[4] The respondent alleged that the appellant had entered the said premises on 2 June 2012 without the respondent's knowledge and consent. He further alleged that the appellant had thrown all the respondent's valuable goods, costly paintings, furniture, handicrafts and important documents out from the premises. The respondent sued the appellant for his wrongful action at the Sessions Court. The suit went through a full trial.

[5] On 24 February 2014, the learned SCJ decided in favour of the respondent. Damages were assessed by the Registrar, and the respondent was awarded RM300,000 as damages and costs of RM5,000 on 17 November 2014. The appellant was not satisfied with the learned SCJ's decision dated 24 February 2014, but the appellant did not file a notice of appeal within the stipulated time under O. 55 r. 2 of the ROC which states:

> All appeals to the High Court shall be by way of re-hearing and shall be brought by giving a notice of appeal within fourteen days from the date of the decision appealed from.

The Findings Of The Court

The Law

[6] The procedure for filing an appeal to the High Court against a decision (from the lower court) after trial is stated in O. 55 r. 3 of the ROC. The time to file a notice of appeal is stated in r. 2 of the same Order - 14 days from the date of the decision appealed from.

[7] It is settled law that it is entirely up to the discretion of the court whether to allow or not allow an application for an extension of time to file a notice of appeal. Order 3 r. 5 of the ROC permits the court, as it thinks just, to extend or abridge the period within which a person is required or authorised by the rules to do any act in any proceedings. The proposition of

law on this point has been lucidly expounded in the Federal Court decision in *National Union of Bank Employees v. Director General of Trade Unions & Anor* [2014] 1 LNS 1124; [2013] MLJU 827).

[8] The Federal Court has in *National Union of Bank Employees* (*supra*) laid down guidance with regard to the factors to be considered by the court in its exercise of its discretion. The apex court referred to and affirmed the High Court decision in *Saeed U Khan v. Lee Kok Hooi* [2000] 7 CLJ 454; [2001] 5 MLJ 416. In that case, the High Court held that the court, when exercising its discretion to extend time, has to consider the following factors: (i) the delay in making an application; (ii) whether or not there are cogent reasons for the litigant not to have made application within the prescribed time; and (iii) the likelihood and degree of prejudice, as well as injustice to the opposite party should the court exercise its discretion. Refer also to *Zul Ali v. PLUS Malaysia* [2015] 1 LNS 126, where the High Court had applied these three factors laid down by the Federal Court in coming to its decision.

[9] In an earlier High Court decision, *Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors* [1993] 4 CLJ 176; [1994] 2 MLJ 424, it was held that factors such as (i) the length of the delay; (ii) the reasons for the delay; (iii) the chances of the appeal; and (iv) the degree of prejudice to the potential respondent if the application is granted are required to be considered by the court before it exercises its discretion. It was also held that this framework or guide is not intended to be rigid mandatory requirement (see also *Hau Khee Wee & Anor v. Chua Kian Tong & Anor* [1986] 1 LNS 26; [1987] 2 MLJ 146; *Ling Siok Seng v. Ting Sieh Chung* [1998] 4 CLJ 169; *MBf Finance Bhd v. Alluwi Salleh t/a ABS Bina Enterprise & Anor* [2002] 2 CLJ 133).

[10] There is a plethora of cases that suggest an applicant has to allude some facts or law to show that he has an arguable case (see *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449; *Ratnam v. Cumarasamy & Anor* [1964] 1 LNS 237; [1965] 1 MLJ 228; *Tan Siew Peng v. OCBC Bank (M) Bhd* [1998] 2 CLJ 684; *Safety Insurance Co Ltd v. Wong Choo Yong* [1970] 1 LNS 141; [1971] 1 MLJ 167; *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor and Another Appeal* [1995] 4 CLJ 484; and *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 CLJ 628). Showing an arguable case connotes the "chances of appeal".

[11] However, it is to be noted that in *National Union of Bank Employees*, the Federal Court did not refer to those cases cited above. The Federal Court has left out "the chances of appeal" as a factor to be considered when a court is exercising its discretion to allow or not to allow extension of time. *National Union of Bank Employees* was decided after those cases in 2013. Be that as it may, the nuance of the decision of the Federal Court is that justice must be served in the outcome of the court's exercise of discretion.

The Length Of And Reason For Delay

[12] In this instant case, the learned SCJ's decision was pronounced on 24 February 2014. The appellant did not file a notice of appeal within 14 days from 24 February 2014. On 24 December 2014, nine months later, the appellant filed an originating summons in the High Court seeking leave of this court to enlarge or abridge the time to file the notice of appeal.

[13] The main reason provided by the appellant for the delay is as follows:

> Kegagalan atau kelewatan Defenden/Pemohon untuk memfailkan Notis Rayuan adalah kerana Defendan/Pemohon tersalah anggap bahawa keputusan muktamad tuntutan Plaintif/Responden belum di buat oleh Mahkamah Sesyen sehingga amaun gantirugi ditetapkan untuk Defendan/Pemohon bayar kepada Plaintif/Responden, dan Mahkamah Sesyen hanya telah pada 17 November 2014 putuskan supaya Defendan/Pemohon membayar RM300,000.00 gantirugi dan kos RM5,000.00 kepada Plaintif/Responden.

(see alasan-alasan permohonan stated in the saman pemula dated 24 December 2014)

[14] The main reason given for the delay was that the appellant had mistakenly thought (tersalah anggap) that the decision of the learned SCJ dated 24 February 2014 was not final until a sum for damages had been determined by the court.

[15] This court was baffled by the reason given by the appellant. Firstly, the appellant was represented by a firm of solicitors, Messrs Mazlida, Azlina & Co, and the trial was conducted by a counsel named Azira. The appellant ought to have been advised by his solicitors that the learned SCJ's decision dated 24 February 2014 was final. If the solicitors failed to advise the appellant properly, this could not be a tenable reason for the court to exercise its discretion. Likewise, if the solicitors overlooked the stipulated timeline or was unaware of the timeline to file a notice of appeal, this also could not be a tenable reason for this court to exercise its discretion.

[16] The Court of Appeal in the case of *Gurdev Kaur Bhag Singh v. BSN Commercial Bank (M) Bhd* [2003] 1 CLJ 429 held that it was "settled law" that a solicitor's mistake was not an acceptable explanation for an extension of time application. It also held that an appellant can always seek remedy elsewhere if the appellant has any grievance against his/her former solicitor (see also cases *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 1 LNS 42; [1975] 2 MLJ 129; *Tractors (M) Bhd v. Southern Estates Sdn Bhd & Anor* [1984] 1 CLJ 154; [1984] 1 CLJ (Rep) 398).

[17] Secondly, the manner in which the reason for delay was proffered was as if the appellant was unaware of procedural law. This court could not accept such reason given by the appellant as it was held in *Ahmad bin Yahaya & Anor v. Ahmad bin Sulaiman* [1972] 1 LNS 4; [1972] 2 MLJ 109 that "ignorance of procedural law is not an acceptable explanation".

[18] It is clear from the above cases that regardless whether the fault lies with the solicitor or the appellant, the reason offered by the appellant for his failure to file a notice of appeal within time is not an acceptable reason for the court to exercise its discretion to enlarge the time. On this premise, this court did not allow the application to enlarge time to file the notice of appeal. Nine months is too long for the appellant to realise his mistake. Further, the court was of the view that the appellant's reason for the delay is questionable as the appellant did not take any action to file a notice of appeal within 14 days from 17 November 2014, the date the decision on the sum of damages was made.

The Likelihood And Degree Of Prejudice, And Injustice To The Opposite Party

[19] The appellant's reasons for the appeal are found in the saman pemula (encl. 1) and they may be summarised as follows. Firstly, the respondent was not legally permitted to stay in Malaysia during the time when the trial was proceeding. Secondly, the tenancy agreement entered into between the parties contravened the provisions of the Enactment No. 63 (Malay Reservations), Kedah, as such, the tenancy agreement is void under the Contracts Act 1950. Therefore, the alleged wrongful entry into the premises could not be considered as trespass in law.

[20] In the affidavit-in-support (afidavit sokongan), affirmed by the appellant on 18 December 2014 (or 21 December 2014 as printed at the endorsement page) (encl. 2) in support of the originating summons' application, the appellant had set out the chronology of events leading to the dispute between the parties (see paras. 3 to 6). The facts in support of the two reasons for the appeal are found in paras. 7(d), (e) and (f).

[21] In addition to the above, the appellant had also filed (i) afidavit tambahan affirmed by the appellant dated 23 February 2015 (encl. 6) - enclosing the notes of proceedings; (ii) notis permohonan supported by the appellant's affidavit dated 23 March 2014 (encls. 10 and 11 respectively) - enclosing several police reports that were lodged by the respondent and the appellant respectively. The respondent objected to the appellant's application to file further supporting affidavit (encl. 10), but the court allowed the appellant's application. The exhibits in the supporting affidavit were considered by the court.

[22] Having perused all the affidavits of the appellant and the exhibits enclosed therein, this court was of the considered view that if the appellant's application was allowed, there would be likelihood of prejudice and injustice to the respondent.

[23] Firstly, the allegation that the respondent was not legally permitted to stay in Malaysia at the time of the trial could not derogate or vitiate the legality of the proceedings in the lower court. The respondent, even if the allegation was true, was not debarred from giving evidence as a competent

witness in the proceedings. There is nothing under Chapter IX of the Evidence Act 1950 that suggests that the respondent was not a competent witness to give evidence in any court proceedings or that he was barred from giving evidence because of his legal status.

[24] Secondly, the appellant's allegation that the tenancy agreement had contravened the State law does not provide any legal basis for the appellant to damage the respondent's properties. Section 9 of the Enactment No. 63 (Malay Reservations), Kedah, states as follows:

> Nothing in Section 6 contained shall be deemed to prevent the leasing of Reservation land by a Malay to a person other than a Malay or a Siamese for a term not exceeding three years; provided that any document executed prior to or during the continuance of such term which purports to extend the term, whether by renewal of the lease or otherwise, beyond three years shall be void and provided further that no bendang land ...

[25] The appellant alleged that cl. 12 of the tenancy agreement allowed the parties to renew the tenancy agreement upon its expiry on 30 June 2010 for a term of three years, and followed by another three years, and further three years and four years, which ends on 30 June 2023.

[26] On the face of it, it seems to the court that the tenancy agreement had indeed contravened the State law, particularly in the renewal of the last term of four years. However, even if the court accepted that the tenancy agreement was void, the court could not accept that the appellant had the right to damage the respondent's properties, just because the tenancy agreement was void.

[27] Void or invalid tenancy agreement does not give rise to a right for a landlord to damage the tenant's belongings which are kept in the landlord's premises. A tenancy agreement is within the purview of the law of contract; whereas, damage to property is within the purview of law of tort. In this instant case, the appellant damaged the respondent's properties without just cause, as such the respondent had a right to sue the appellant under the law of tort. It would be unjust for this court to deny the respondent's right to claim compensation for damage to his properties which was caused by the appellant.

[28] In addition to the two points stated earlier, the appellant had also raised one more point in support of his application. The appellant alleged that the respondent had adduced false evidence at the trial and misled the court. This point was not included in his originating summons (encl. 1), but it was found in the appellant's affidavit dated 23 March 2015 (encl. 11). The appellant's counsel had, in his written submission, submitted on it.

[29] This court gave the benefit of doubt to the appellant's allegation and considered the point raised, although it was not included earlier in the originating summons.

[30] This court was of the considered view that what was raised in the appellant's affidavit did not warrant this court to exercise its discretion to enlarge the time to file the notice of appeal. What was alleged concerned the attachment to the respondent's police report (see exhs. "Samsu 1" and "Samsu 2" in encl. 11). The appellant alleged that there were extra pages attached to the respondent's police report, whereas the actual police report did not contain all those pages. It was not disputed that the respondent had in fact adduced these extra pages during the trial.

[31] The SCJ could not have been influenced by the alleged extra pages of the attachment to the police report (see exh. "Samsu 1" and compare with exh. "Samsu 2") in coming to his decision. The alleged extra pages which were attached to the respondent's police report (exh. "Samsu 1") contained facts and a list of items damaged or lost as well as their value.

[32] The decision and findings of the trial court were founded on the witnesses' testimonies, factual evidence as well as the proof of the actual loss suffered by the respondent. The appellant had the opportunity to cross-examine the respondent and to defend his case during the trial. The appellant could not have been prejudiced in any way during the trial because of the extra pages attached in the respondent's police report.

[33] If this court accepted the appellant's point relating to the alleged extra pages of the attachment to the police report, the outcome would seriously prejudice the respondent, and cause injustice to the respondent. If the application to enlarge time to file the notice of appeal was granted, the appellant would have two bites of the cherry.

[34] In the final analysis, the court was of the considered view that the argument advanced by the appellant in support of his application could and should have been raised and argued at the trial stage. Those issues should have been canvassed and argued at the trial. The failure to raise or argue certain issues which could have been raised at the lower is not a cogent reason for leave to be granted to file a notice of appeal out of time.

Decision

[35] Based on the above reasoning, this court disallowed the appellant's application and awarded costs of RM2,000 to the respondent.